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No. 562

In the Supreme Court of the United States

OCTOBER TERM, 1946

RUTHERFORD FOOD CORPORATION AND THE GEORGE KAISER PACKING COMPANY, PETITIONERS

v.

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR

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BRIEF FOR THE ADMINISTRATOR

OPINIONS BELOW

The opinion of the District Court (R. 144–157) and its findings of fact and conclusions of law (R. 157–163) are not reported. The opinions of the Circuit Court of Appeals for the Tenth Circuit (R. 167–177), reversing the judgment of the District Court, are reported at 156 F. 2d 513.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 18, 1946 (R. 177). The

*The Acting Solicitor General is filing a motion to substitute as respondent the Honorable William R. McComb, successor to the Honorable L. Metcalfe Walling, as Administrator of the Wage and Hour Division, U. S. Department of Labor.

petition for a writ of certiorari was filed on October 2, 1946, and granted November 12, 1946 (R. 189). The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain persons working as boners in petitioners' slaughterhouse are employees of petitioners within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

The statutory provisions involved are Sections 3 (d), 3 (e), 3 (g), 7 (a)-(3) and 11 (c) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, which are set forth in the Appendix, pp. 57–58.

STATEMENT

The facts of this case have been largely stipulated and are not in dispute (R. 10–31). While petitioners' brief adequately summarizes the contractual arrangements with the boners, we think that a more complete statement of the actual operation of the contracts and of the boners' functions in relation to the operation of petitioners' plant is required for a determination of the issues presented.

Petitioners, operating a slaughterhouse in Kansas City, Kansas, employ approximately 30 to 32 employees in the production of boned meat

(R. 11–13, 16, 17, 18, 20, 30), in addition to the 5 to 8 persons working as boners whose status is involved here (R. 16–17, 30).[1] The slaughterhouse operations are carried on in a manner similar to methods used in a highly integrated assembly-line production (R. 18, 19, 20, 169–170). The cattle are slaughtered, skinned and dressed in the killing room (R. 18, 19). The carcasses are then moved by means of an overhead rail system through a series of processes performed by admitted employees of petitioners (R. 18–19, 20–21, 170), first to the hot cooler for overnight cooling, then to the main cooler the following morning (R. 18, 68–69, 169), and then into the boning vestibule (R. 18, 169). Admitted employees of petitioners also work in the boning vestibule while the carcasses are still on the main rail, removing pieces of hide, fat or dirt, weighing the carcasses and switching them to the boners' detour rail (R. 19, 73, 170). The boning vestibule contains two long tables, one small table, barrels, and the overhead rails (R. 18, 19, 170). The boners work along the two long tables (R. 18). The small table is used by a trimmer, who is admittedly an employee (R. 20–21).

When the carcasses move into the boning vestibule, they are completely dressed and have been

[1] As stated in the petition for certiorari, each of petitioners operated the plant at different times and the issues are the same as to both petitioners (Pet., p. 3).

split down the backbone (R. 19). The boners quarter the carcass and perform the boning by holding the meat with a hook and removing the meat from the bones with a knife. As the meat is removed from the bones, it is thrown by the boners directly into barrels or handed to the trimmer, who uses a hook and knife to remove the remaining small pieces of meat from fat and cartilage. The trimmed meat is thrown into the barrels containing the boned meat (R. 19, 20, 170). As the barrels are filled, they are removed from the boning vestibule to the dock, weighed, and put on trucks by petitioners' admitted employees (R. 20, 170). The barrels are washed in a separate room and brought into the boning vestibule also by petitioners' employees (R. 20, 170). The entire operation from the killing to the placing of the boned beef upon the dock for loading on trucks "normally takes 48 hours, or slightly more" (R. 18) and is an integrated continuous process (R. 172).

The tables, barrels and rails in the boning vestibule are owned by petitioners (R. 20, 170). The boners, as well as the trimmer, furnish their own leather belts, hooks, and knives (R. 20, 170), but the aprons worn by all of them are furnished and laundered by petitioners (R. 20, 170).

Prior to October 1942, the Kaiser plant did very little boning and it was done by an hourly paid employee employed as a combined butcher,

beef boner, and order filler (R. 16). In the summer and fall of 1942, petitioners undertook to furnish a great amount of beef boned to Army specifications (R. 16), and therefore required more boners. Instead of hiring the boners in the same manner as the other workers in the plant, petitioners entered into contracts with one or two boners which provided that they, as "independent contractors", would perform the boning in the boning vestibule of petitioners' plant for a specified sum per hundred pounds of boneless beef (R. 32–39). Under the terms of the original contract entered into in October 1942, Kaiser agreed to furnish the carcasses for boning and supply such equipment as tables and barrels (R. 32). The contract provided that the "contractor" was to "employ, compensate and be responsible for all of his employees," to supervise and control such employees, to carry workmen's compensation and employers' liability insurance covering them, and that any boners hired by him should be affiliated with the industrial union in the plant (R. 33–35).[2] Settlements for amounts due the "contractor" were to be made up and paid on a weekly basis (R. 34). The contract was to continue in effect "for the duration of hostilities"

[2] In fact, all the boners, including the contractors, were required by the union to become union members, although the union contract with respect to job classifications, wage scales and working conditions does not cover the boners (R. 23, 170).

but could be terminated by either party upon two weeks' notice (R. 34–35).

This contract actually remained in effect for approximately four months when the first two contractors who had signed the agreement quit work without notice (R. 16–17, 160, 169). After they abandoned the work, one of the boners from the group became the "independent contractor" by orally assuming the terms of the original contract (R. 17, 160, 169). He carried out the contract for approximately fifteen months when he also quit without notice and was replaced by two other boners from the group who carried on the work until November 1944 (R. 17, 160, 169). On October 28, 1944, petitioners entered into a written contract with one Hooper which contained substantially the same terms as the original written agreement (R. 35–39). Unlike the original agreement, however, the Hooper contract did not designate an "independent contractor" but purported to let "the Boning Room, together with the rails, tables and other fixtures now therein" to Hooper who signed the contract as "The Frank Hooper Boning Company, by Frank Hooper" (R. 35–36, 39). The contract rate was increased five cents per hundred pounds of boned beef, and a clause was added providing a rental of $100 a month to be paid for the "lease" of the boning vestibule. However, no rental has ever been paid (R. 20, 160, 169). Hooper stated that although he signed the contract at the office of Kaiser's

lawyer, he did not know who drew it and that he had nothing to do with the language used in it (R. 56, 58). He never received a copy of the contract and did not even know whether the petitioners or any representatives of theirs had ever signed it (R. 58).

The contract provided that petitioners should not have the right to supervise or control the work done by the "contractor" or his employees (R. 33, 37). However, the contract provided not only that the boning should be performed on petitioners' premises but that it be done "in full compliance with all applicable Government Specifications and Regulations" and "in accordance with the approval and directions of all Government inspectors" (R. 33, par. 6).[1] In addition, the contract provided in detail just what parts should be removed from the carcasses, what meat cuts should be made, and how the parts and cuts should be sorted (R. 32–33, pars. 3, 4, and 5 of the contract).[2] Although there has been no strict

[1] Paragraph 6 of the contract reads as follows: "6. All of the said work to be performed by Reed shall be performed in full compliance with all applicable Government Specifications and Regulations, from time to time applying to the work to be performed by him or to the said items or to any sales agreement or sales order with the U. S. Government, and all of said work shall be under and in accordance with the approval and directions of all Government inspectors."

[2] "3. The boning of said carcasses, which Reed agrees to perform shall cover, in addition to actual boning, the stripping of serous membranes from flanks, skirts and naval

supervision of hours worked by the boners (R. 61, 170), the hours are in fact determined by the number of cattle slaughtered and the hours worked by the Government inspector (R. 23, 61, 170). Since a Government inspector must be present when the boning operations are performed, work is centralized in one room (R. 78) and continued as long as the inspector is on duty (R. 61). Also, Kaiser, who manages the plant and is personally in charge of its operation (R. 66), is in and out of the boning vestibule all of the time. He is "all over the plant so many times a day, I couldn't tell you how many times I do go around" and "probably go through there [the boning vestibule] a dozen times a day" (R. 79). He is "continuously" after the boners to get

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ends, including the removal or stripping of leaders, glands, skins, kidney knobs, large veins, blood stains and clots, and the removal of required fat, and shall also cover the cutting of said carcasses into boneless chucks, boneless ribs, boneless plates, boneless loins and boneless rounds.

"4. Reed shall perform all work herein provided for as an independent contractor in the vestibule of the Kaiser Packing Plant. Kaiser's shall deliver said carcasses to Reed on the rails in said vestibule, and Kaiser's shall pick up the boned meat, tenderloins, Kidney Knobs, bones, fat products and waste, after the same have been sorted by Reed in barrels as hereinafter provided. Kaiser's shall also furnish and wash all barrels required for the sorting of said items.

"5. Reed shall separately sort and place in separate barrels, so furnished him by Kaiser's, (a) all meat cuts including tenderloins, (b) all bones, (c) all fats and waste, and (d) all kidney knobs."

the bones good and clean (R. 79), and when he has to leave the plant he asks the assistant manager "to kind of watch it for me" (R. 80).

The money received by the "contractor" from petitioners usually has been divided equally among all the boners (R. 22, 160, 169), although petitioners customarily have advanced money throughout the week to the boners (R. 97). Prior to November 1944, however, part-time, occasional or inexperienced boners were paid an hourly rate by the "contractor," but this practice has been discontinued (R. 22, 160). The "contractors," like the other boners, share equally in the boning money, and, like the others, do not receive compensation for days not worked (R. 22, 23, 58–59). When special jobs have to be done, petitioners pay the individual boners an hourly rate (R. 107–108), and all of the boners have been so employed by petitioners part of the time (R. 108).

The District Court held that "the relation of employer and employee did not exist between the defendants [petitioners] and the beef boners" (R. 163), and dismissed the Administrator's complaint (R. 163). The Circuit Court of Appeals for the Tenth Circuit reversed, holding that while the direction and control test "along with others" may be taken into consideration, "it is not necessarily decisive in a case of this kind, as the Act concerns itself with the correction of economic evils through remedies which were unknown at

common law (R. 172). Therefore, "in doubtful situations, coverage is to be determined broadly by reference to the underlying economic realities rather than by traditional rules governing legal classifications of master and servant on one hand, and employer and independent contractor on the other" (R. 171). The court concluded that "these underlying economic realities * * * lead to the conclusion that the boners were and are employees" of petitioners within the meaning of the Act (R. 172).

SUMMARY OF ARGUMENT

I

All of the boners, including the contractor-boners, are petitioners' employees within the meaning of the Fair Labor Standards Act. Not only is the Act a remedial statute whose purposes require a broad interpretation of the employment relationships within its scope, but the statute "contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." *Walling* v. *Portland Terminal Co.*, No. 336, this Term, decided February 17, 1947, slip sheet, p. 3; *United States* v. *Rosenwasser*, 323 U. S. 360. The purposes of this Act require a practical, realistic construction of the employment relationship (cf. *National Labor*

Relations Board v. *Hearst Publications*, 322 U. S. 111), and the broad language of the statutory definitions is more than adequate to support such a construction.

A. The contractor-boners, like the other boners, are ordinary skilled manual laborers within the class of workers clearly intended to be covered by the Act. The basic objective of the Act—to eliminate as rapidly as practicable "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" the existence of which Congress found to be "an unfair method of competition in commerce" (Section 2)—would be defeated if an employee were deprived of its benefits by the simple device of calling him an "independent contractor." The necessity for maintenance of the statutory standards is not affected by the label which is applied, nor is the competitive effect of an article produced by a contractor-boner working under substandard conditions any the less destructive of the statutory standards than an article produced by employee-boners working under substandard conditions. This is not to say that genuine entrepreneurs occupying established places in our industrial structure as independent contractors should be held "employees" within the scope of the Act. But the circumstances of this case show that the boners here involved are workers in the most

fundamental sense. Applying a test based upon practical realities, rather than abstract legalisms, these boners cannot be regarded as independent contractors without doing violence to a common-sense construction of the Act.

The nature of the work of the contractor-boners, the close interrelation of their work with the work of admitted employees in the integrated production process carried on by petitioners, their union membership, their basis of compensation, their lack of independent economic or financial resources, and the actual operation of the contract, are all characteristic of an employment relationship rather than an independent contractor. Nor, upon analysis, do the terms of the contract negate the existence of an employment relationship. The contract provisions purporting to give the contractor-boner independent control over the boning operations and employees are so qualified by other contract provisions, giving detailed instructions of the work expected of the boners and requiring all work to be done pursuant to detailed Government Specifications and Regulations and in the presence of a Government inspector, as to make the control and independence largely theoretical. The power of the contractor-boner to hire other boners and his limited control over the other boners are hardly sufficient, when weighed with the other pertinent facts, to exclude him from the employee class. His independence scarcely exceeds

that of the boners he hired, and his authority to hire, fire, and supervise differs not at all from that of a working foreman or of countless other employees exercising some supervisory duties on behalf of their employees.

The decisions of the circuit courts of appeals under this Act, both before and after this Court's decision in the *Hearst* case, have been virtually unanimous in holding that neither technical, common law concepts nor contract terminology are the exclusive criteria for determining the employment relationships covered by the Act. They have uniformly recognized the applicability to this Act of the realistic, common-sense approach indicated in the *Hearst* decision. Petitioners' attempt to distinguish these decisions on the ground that they involved "colorable, fraudulent and sham contracts" will not bear analysis.

B. If the contractor-boners are petitioners' employees, *a fortiori* the boners hired by the contractor-boners are petitioners' employees. Plainly, the contractor-boners are acting "directly * * * in the interest of" their employer in hiring the other boners. The same reasons which support the conclusion that petitioners are employers of the contractor-boners apply with equal, if not greater, force to the other boners. These boners are admittedly employees within the protection of the Act, and the only question is whether the responsibility for their working stand-

ards rests upon petitioners, the proprietors of the business, or upon the contractor boners. The whole purpose of the legislation is certainly opposed to any such shifting or delegation of responsibility, and the language of the statutory definitions appears to have been chosen deliberately to protect the statutory standards from such circumvention. It would defeat the basic purpose of this Act to allow the responsibility for maintaining minimum labor standards to be delegated to persons who are themselves dependent workers and are not independent contractors "in the only sense in which that phrase is here relevant." *Lehigh Valley Coal Co.* v. *Yensavage,* 218 Fed. 547, at 552.

The fact that petitioners may not have assumed a contractual obligation to pay these boners compensation does not mean that they have no statutory obligation for maintenance of the minimum labor standards with respect to them. *Walling* v. *Portland Terminal Co.,* No. 336, this Term, decided February 17, 1947, does not repudiate the long recognized view that an employment relationship can exist even though the employee must look elsewhere than to his employer for his compensation.

II

The district court's findings of fact do not foreclose the ultimate legal issue whether the

boners are petitioners' employees. The majority opinion of the circuit court of appeals does not take issue with the findings of fact but only with the legal conclusions of the district court. Moreover, since all of the evidence was documentary or by way of pre-trial depositions and stipulations, and there was no oral testimony taken before the trial court, the appellate court was in as good a position as the trial court to appraise the evidence and was not conclusively bound by the trial court's findings. Certainly the trial court's "findings" are not conclusive on the ultimate legal issue as to whether the boners were petitioners' employees, since such "findings" were based upon a mistaken construction of the employment relationship under the Act.

III

Even if the boners should not be held to be petitioners' employees, the decision of the court below should be affirmed on the ground that petitioners shipped goods in violation of Section 15 (a) (1) of the Act. Petitioners violated Section 15 (a) (1) by shipping in commerce meat with knowledge that it was produced by employees who worked under substandard conditions, and the injunction order is independently warranted on this ground. It is incontestable that the noncontractor-boners, at least, regardless of who their employers are, are "employees" entitled to the protection of the Act.

ARGUMENT

I

ALL OF THE BONERS ARE "EMPLOYEES" OF PETITIONERS WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT

Two groups of boners are involved in this case: (1) the chief boners or "contractors" who entered into contracts with the petitioners; and (2) the other boners hired by the "contractors." Petitioners seem to have assumed, without argument, that the "contractors" are not employees; their brief argues only the questions relating to the status of the other boners. It is the Administrator's contention that both groups of boners are employees of petitioners within the meaning of the Fair Labor Standards Act; that the chief boners, like the other workers in petitioners' plant, are ordinary workers who have only their services to sell, and whose services for petitioners have neither the physical nor economic indicia of independence sufficient to exclude them from the broad statutory definitions of employment in the Act; that the other boners were hired by the "contractors," acting as agents for and directly in the interests of petitioners, to work solely for petitioners; and that, therefore, petitioners cannot avoid responsibility under the Act for the labor standards of both groups of workers.

The process of construction must begin, of course, with the language of the statute. The pertinent provisions of the Act are as follows:

SEC. 3. As used in this Act—

* * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

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SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one

and one-half times the regular rate at which he is employed.

As this Court pointed out in a recent decision, the Fair Labor Standards Act "contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." *Walling* v. *Portland Terminal Co.*, No. 336, this Term, decided February 17, 1947, slip sheet, p. 3. Consequently, it is clear that "common law employee categories or employer-employee classifications under other statutes are not of controlling significance." *Ibid.*, p. 2. We have here, not only a statute whose remedial purposes require by implication a broad and liberal construction of the employment relationships within its scope (See *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111), but an explicit and deliberate definition which, during its consideration by Congress, was characterized as "the broadest definition that has ever been included in any one act" (81 Cong. Rec. 7657, 75th Cong., 1st sess.), and of which this Court has said, "a broader or more comprehensive coverage of employees within the stated categories would be difficult to frame." *United States* v. *Rosenwasser*, 323 U. S. 360, 362. Thus, although the phrase "suffer or permit to work" may not have the all-inclusive scope its literal language might sup-

port (cf. *Walling* v. *Portland Terminal Co.*, No. 336, this Term, decided February 17, 1947), certainly it "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship" (see *Hearst* decision, 322 U. S. 111, at 129), and its scope should not be arbitrarily limited so as to exclude employment relationships where "the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation" (322 U. S. at 128).

A basic purpose of the Fair Labor Standards Act, as of the National Labor Relations Act, is to redress the inherent inequality of bargaining power between employees and employers—under the National Labor Relations Act by encouraging collective bargaining, under the Fair Labor Standards Act by prescribing minimum fair labor standards. There is no less reason for the application of a broad test of coverage under this Act. And it is equally true of this Act as of the National Labor Relations Act that "The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors.'" *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 126.

We do not urge that the literal language of the definitions should be followed to the extent of

holding them applicable to a truly independent contractor. But the definitions in the Fair Labor Standards Act are certainly "easily susceptible" within "the normal meaning of words" (*Addison* v. *Holly Hill*, 322 U. S. 607, 617) to a construction which includes as "employees" those persons whose services in relation to an "employer" are such that, as a practical matter, they would commonly be regarded as his employees. No easy formulation of words is available for use as a criterion in every case. "Considerations of proximity and degree are here, as so often in the law, decisive." *Freeman* v. *Hewit*, No. 3, this Term, decided December 16, 1946, slip opinion, p. 5. The test is, we believe, a realistic one calling for the exercise of a practical judgment mindful of the broad social and economic objectives which Congress sought to attain through enactment of the Fair Labor Standards Act. We urge a test based upon concrete industrial realities, and not upon abstract technical legalisms. This commonsense test, if applied here, leads to the conclusion that all of the boners working in petitioners' slaughterhouse were their employees. In a very real sense, all were "working for" petitioners, and not for themselves. To regard any of them as independent contractors who are "on their own" is inconsistent with a realistic view of the facts; and, for the same reason, it is inconsistent with a sound construction of the Act.

A. THE "CONTRACTOR" BONERS

Petitioners, relying principally upon the absence of any contractual relation with the boners, and upon the fact that they worked "'without promise or expectation of compensation' from the plant operator" (Pet. Br., p. 22), apparently assume, without argument, that the contract sufficed to remove the boners who signed it from the scope of the Act. But it cannot be said of these contractors that they had no "direct contractual relationship" with petitioners, nor can it be said that they worked without promise or expectation of compensation from petitioners (cf. Pet. Br., points III and IV). They are unquestionably employed by petitioners within the literal terms of the statutory definitions. Petitioners "suffer and permit" them "to work" in petitioners' business, to petitioners' immediate advantage and under an express agreement that petitioners shall pay them. Cf. *Walling* v. *Portland Terminal Co., supra,* slip sheet, pp. 4–5. Thus, with respect to these "contractor" boners, petitioners' argument can only be that their agreement to work as "independent contractors," with authority to hire and fire and control other employees, automatically removes them from the scope of the Act.

But this Court's opinion in the *Hearst* case, *supra,* shows that the labels used in a contract of this type ought not to be of controlling significance in determining the application of a statute of this

character. This is not to say that the contract is entitled to no consideration; clearly it is to be considered, along with other relevant factors, in making a realistic determination of the true relationship between the parties. But the contract provisions and characterizations are to be given weight only in the sense that they are relevant to the statutory definitions and objectives. Even apart from the statute, the contract does not establish the nonexistence of an employer-employee relationship. Viewed in relation to the statutory definitions and purposes, the contract signed by a chief boner clearly did not convert him into "an independent contractor in the only sense in which that phrase is here relevant" (see *Lehigh Valley Coal Co.* v. *Yensavage*, 218 Fed. 547, at 552 (C. C. A. 2)).

A basic purpose of the Act was to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" (Section 2) by "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." Message of the President to Congress, May 24, 1934;[5] *Phillips Co.* v. *Walling*, 324 U. S. 490, 493. To this end Congress provided that the channels of interstate commerce could not be employed as a means of spreading standards of work destructive of the health and

[5] H. Doc. 255, 75th Cong., 1st sess.

welfare of workers. *United States* v. *Darby*, 312 U. S. 100, 109. Congress fixed its own standards of minimum wages and maximum hours in order to provide a basic guarantee of health and welfare. The necessity of the maintenance of these standards of wages and hours for the health and welfare of workers is not diminished by the fact that the worker is called a contractor rather than an employee. "Where all the conditions of the relation require protection, protection ought to be given." *Lehigh Valley Coal Co.* v. *Yensavage*, *supra*, at 552; *Labor Board* v. *Hearst Publications*, *supra*, at 120. Neither the language nor the purposes of the Act make a distinction between workers who are called employees and workers who are termed "independent contractors." On the contrary, not only is the statutory language "easily susceptible" within "the normal meaning of words" to inclusion of workers such as the chief boners here (Cf. *Addison* v. *Holly Hill*, *supra*, p. 617), but the primary objectives of the Act necessarily comprehend them.

It is significant that the discussions in Congress,[5] the President's Message,[6] and the statement of purposes in Section 2 of the statute are in terms of "workers" rather than "employees," and in

[5] See S. Rep. No. 884, July 6, 1937, 75th Cong., 1st sess.; see also H. Rep. No. 1452, August 6, 1937, 75th Cong., 1st sess.; Statement of the Managers on the Part of the House in H. Rep. No. 2738, June 11, 1938, 75th Cong., 3rd sess., p. 13.

[6] H. Doc. 255, 75th Cong., 1st sess.

terms of excluding from commerce all goods "produced under conditions which do not meet rudimentary standards."[8] The broad objective was to see that "only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce." *Ibid.* As this Court has pointed out, "This Act seeks to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation * * *. This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce *the competitive advantage accruing from savings in costs based upon substandard labor conditions*". [Italics supplied.] *Roland Electrical Co.* v. *Walling,* 326 U. S. 657, 669–670. Section 2 (a) (3) declares that substandard labor conditions constitute "an unfair method of competition in commerce." The deleterious effects of low labor standards upon competition in interstate commerce provided a primary constitutional basis for Federal legislation in the field. *United States* v. *Darby,* 312 U. S. 100, at 115. Thus, it has been widely recog-

[8] Message of the President of the United States, May 24, 1937, reported in H. Doc. No. 255, p. 3, 75th Cong., 1st sess.; H. Rep. No. 1452, August 6, 1937, 75th Cong., 1st sess., p. 11; H. Rep. No. 2182, April 21, 1938, 75th Cong., 3d sess., p. 7; Statement of the Managers on the Part of the House in H. Rep. No. 2738, June 11, 1938, 75th Cong., 3d sess., p. 13.

nized that an essential requisite to the effective establishment of any basic standards is uniformity of application to prevent persons with lowest standards from underbidding their competitors. The broad definition in Section 3 (g) of the term "employ" appears to have been deliberately directed to this end.

The competitive effect of an article produced by a contractor-worker is no different from that produced by any other worker. Boned beef produced by contractor-boners working under substandard conditions obviously competes in the interstate market with boned beef produced by employee-boners and may be destructive of the work standards of the latter. An employer should not be permitted to obtain "an advantage over competitors in labor costs derived not from efficiency of utilization of labor, but from differences in details of draftsmanship." *Walling* v. *Garlock Packing Co.*, 159 F. 2d 44, 46 (C. C. A. 2). And in this connection it is of some significance that, as petitioners assert in their brief (p. 9), the present action was instituted not because of the complaints of workers but because of the complaints of competitors (Br., p. 9).

If the purposes of the Act are to be effectuated, therefore, the contractor-boners must be deemed within the statutory definition of employment. This is not to say that all independent contractors whose services contribute to the production of

goods for interstate commerce are "employees" under the Act. Undoubtedly there are many genuine entrepreneurs occupying established places in our industrial structure as independent contractors whose recognition as such might do no violence to the statutory objectives. But where the part played in the industrial process is in all essential respects that of the traditional worker, his exclusion from the Act cannot be justified because he is labelled an independent contractor. One who carves meat from carcasses in an assembly line productive process is a worker in the most fundamental sense. This basic fact cannot be altered because a particular employer chooses to shift some additional duties to such a worker and describe these duties as those of an independent contractor.

The background and legislative history of the statutory definitions afford particularly persuasive evidence that Congress did not mean to exclude workers from the scope of this Act because they might be regarded as independent contractors for some purposes under common law concepts. In the original Black-Connery bill, which was not to be applicable to employers employing less than a prescribed number of employees, it was provided that the administrative board should have power to define and determine who were employees of a particular employer, and there was an explicit direction that the definition should be designed

"to prevent the circumvention of the Act or any of its provisions through the use of agents, *independent contractors,* subsidiary or controlled companies, or home or off-premise employees, or by any other means or device."[9] A broad definition of "employee," including "any individual suffered or permitted to work by an employer," subsequently took the place of this provision. See S. 2475, as reported on July 8, 1937, p. 50.[10]

The words "suffer or permit to work" were plainly designed to comprehend all the classes of relationship which previously had been designated specifically as likely means of avoidance of the Act. This language was not new, and was not adopted without knowledge on the part of the legislators of its broad scope. It was taken verbatim from child labor statutes in force in numerous States and from the proposed Uniform Child Labor Law.[11] The language had been inter-

[9] The pertinent portion of Section 6 (a) of S. 2475, 75th Cong., 1st sess., May 24, 1937, read as follows: "The Board shall have power to define by regulation or order the method of computing and determining the number of employees employed by any employer to prevent the circumvention of the Act or any of its provisions through the use of agents, independent contractors, subsidiary or controlled companies, or home or off-premise employees, or by any other means or device."

[10] In the Act, as enacted, the "suffer and permit" language was incorporated in the definition of "employ" rather than in the definition of "employee."

[11] At the time of the enactment of the Fair Labor Standards Act, the phrase "employed, permitted or suffered to work" was contained in the child labor statutes of thirty-two States

preted by a number of State supreme courts as imposing upon a proprietor a nondelegable responsibility with respect not only to children directly employed by him but also to children whom he suffered or permitted to work in his business. As stated by Judge Cardozo in *People ex rel. Price* v. *Sheffield Farms-Slawson-Decker Co.*, 225 N. Y. 25, 29, 121 N. E. 474, 476 (1918), under the terms of such statutes the employer "must neither create nor suffer in his business the prohibited conditions. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others. * * * He breaks the command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he has delegated 'his own power to prevent.'" See also *Commonwealth* v. *Hong*, 261 Mass. 226, 158 N. E. 759 (1927), rejecting the defense that the employees employed in violation

and the District of Columbia. The same phraseology appeared in the Uniform Child Labor Laws recommended in 1911 and in 1930 by the National Conference of Commissioners on Uniform State Laws (Child Labor Bulletin, Vol. I, No. 2, August 1912; Proceedings of the National Conference, 1930), in the Standard Child Labor Law recommended in the Child Labor Legislation Handbook compiled by Josephine C. Goldmark (See e. g., issue of 1904, p. 11), and in the Standards Recommended for Child Labor Legislation by the International Association of Governmental Labor Officials. The phrase "employed or permitted to work" was found in seventeen State statutes as well as in the Federal statutes held unconstitutional in *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Child Labor Tax Case*, 259 U. S. 20. The statutes are cited in the Appendix to this brief, *infra*, pp. 58–60.

of such a statute were employees of an independent contractor on the ground that the offense was committed when the defendant permitted the children to work in his establishment at the prohibited times.[12]

That Congress, in adopting this language, intended that it should be given broad scope similar to the construction of the State child labor laws is further evidenced by the fact that this same definition in the Fair Labor Standards Act applies to the child labor standards as well as to the wage and hour standards prescribed in the Act. As this Court observed in *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, 504: "The definitions of this Act apply to the wage and hour provisions, as well as to the child labor provisions." We do not suppose that petitioners would deny that the "contractors" were "employed" within the meaning of Section 12 (a) of the Act if these "contractors" were under-age minors.

Clearly, therefore, the plain language of the statutory definition and its legislative background call for substantial qualifications to petitioners'

[12] See also *Purtell* v. *Philadelphia & Reading Coal & Iron Co.*, 256 Ill. 110, 99 N. E. 899 (1912), holding that the scope of "suffer or permit to work" extends beyond the common law relation of master and servant. To the same effect *Chattanooga Implement & Mfg. Co.* v. *Harland*, 146 Tenn. 85, 239 S. W. 421 (1922); *Curtis & Gartside Co.* v. *Pigg*, 39 Okla. 31, 134 Pac. 1125 (1913); *Graham* v. *Goodwin*, 170 Miss. 896, 156 So. 513, 514 (1934).

statement that "there is nothing in the Act which would prevent any manufacturer from engaging an independent contractor to perform any particular operation in connection with work performed in an assembly-line" (Br., p. 13). Were this statement true in the sense that petitioners argue, the Act would soon become a complete nullity. Whatever reasons there might be to limit the application of the statutory definitions with respect to a truly independent entrepreneur, the legislative background and purposes clearly do not warrant excluding from the protection of the Act workers who have none of the indicia of an independent entrepreneur and who are in no better or more independent position than ordinary skilled workers dependent upon the sale of their services for their livelihoods.

Petitioners lean heavily on the contract provisions under which the contractor agrees to hire, be responsible for and compensate the boners and is given "sole direction and control" over them, with express disavowal of any right of control by the plant operator. But, even if it be assumed that the contractor's control in these respects was not qualified by other provisions of the contract and that the character of the operations was such as to afford the contractor unfettered independence of action, nevertheless these indicia of independence are sufficiently counteracted by the fact that the contractor devotes all his normal working time to petitioners' productive operations

and receives all his compensation from these activities. The degree of the contractor-boner's independence scarcely exceeds that of the boners he hires, and differs not at all from that of a working foreman or of countless other employees exercising some supervisory duties on behalf of their employers. Upon analysis, therefore, the terms of the contracts in this case are not inconsistent with a conclusion that the contractors are employees under this Act.

The pattern of the contractor-boners' participation in petitioners' business is characteristic of employment rather than independent operation. They work in petitioners' plant right alongside other boners doing the same sort of skilled or semi-skilled operations (R. 104), and right alongside admitted employees of petitioners (R. 20–21, 170). The work of these admitted employees and the boning are steps in a closely integrated process resembling the conventional factory assembly line with admitted employees performing operations both prior and subsequent to the boning. They were under the continuous, ever-vigilant eye of the plant manager (R. 79–80), as well as "under constant army inspection" (R. 161).

The contractor-boner's supposed right of control over the hours, methods of work and working conditions of the boners is largely theoretical. This right of control is so qualified by the terms of the contract, and is so restricted by requirements

of Government inspection and specifications, as to be virtually nonexistent. The contract provides in utmost detail what parts should be stripped or removed before passing the meat to the trimmer, exactly what meat cuts should be made, and how the pieces should be sorted (R. 32–33, pars. 3, 4, and 5 of Agreement).[13] With such detailed specifications, little, if any, further supervision by an employer was necessary for employees with any experience at the task they are performing. The nature of an employee's work "may be such that much or little supervision may be necessary." *Fischer* v. *Industrial Comm.*, 301 Ill. 621, 629.[14] To allow an employer to escape responsibility under the Act "because the employee exercises the judgment with respect to the work that is expected of

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[13] Paragraphs 3, 4, and 5 of the agreement, quoted in the Statement, *supra*, p. 7, n. 4, indicate how little leeway the contract left for the exercise of independent judgment on how to perform the work.

[14] See also *Peasley* v. *Murphy*, 381 Ill. 187; *Allied Mutuals Liability Insurance Co.* v. *DeJong*, 209 N. Y. App. Div. 505, 507; *Allaby* v. *Industrial Comm.*, 200 Wis. 611, 614; *Industrial Comm.* v. *Bonfils*, 78 Colo. 306 (coal hauler); *Burruss* v. *B. M. C. Logging Co.*, 38 N. M. 254 (log hauler); *Martin* v. *Republic Steel Co.*, 226 Ala. 209 (pit digger); *Showers* v. *Lund*, 123 Neb. 56 (gravel hauler); *Burt* v. *Davis-Wood Lumber Co.*, 157 La. 141 (lumber hauler); *Coppes Bros. & Zook* v. *Pontius*, 76 Ind. App. 298 (log hauler); *Muncie Foundry, etc. Co.* v. *Thompson*, 70 Ind. App. 157 (coke unloader); *Holmes* v. *Railroad Co. et al.*, 49 La. Ann. 1465 (coal unloader); *Murray's Case*, 130 Me. 181 (coal unloader).

any skilled worker, is to lose the substance of the relationship in attempting to apply certain rule of thumb distinctions in the law of independent contractors." See *United States* v. *Vogue*, 145 F. 2d 609, 611 (C. C. A. 4).

In addition, the contract requires the contractor to perform the work "in full compliance with all applicable Government Specifications and Regulations" and "in accordance with the approval and directions of all Government inspectors" (R. 33, par. 6). This requirement not only virtually nullifies any right of control or supervision the contractor supposedly has over methods of performing the work, but also determines the hours of work of the boners. To say that the boners themselves, not Kaiser, control their hours of work (Pet. Br., p. 23, also fdg. 16, R. 161) is meaningless in the face of the fact that working hours are in fact determined by the hours when the Government inspector is at the plant (R. 61, 63). The contractors, along with the other boners and admitted employees of petitioners, work regular hours and as steadily as ordinary employees (R. 23); cf. *Swift & Co.* v. *Alston*, 48 Ga. App. 649; *Martin* v. *Republic Steel Co.*, 226 Ala. 209; *Kirk* v. *Yarmouth Lime Co.*, 137 Me. 73; *Warner* v. *Fullerton-Powell Hardwood Lumber Co.*, 231 Mich 328; *Showers* v. *Lund*, 123 Neb. 56; *Bradley* v. *Republic Creosoting Co.*, 281 Mich.

177; *Burruss* v. *B. M. C. Logging Co.*, 38 N. M. 254.[15]

Further evidence of the employment status of the contractors is the fact that they, together with their coworkers, are members of the C. I. O. Union which represents all employees working in the plant (R. 23, 104).[16] Employers are normally excluded from union membership. The Packing House Workers Organizing Committee, Local 36 (C. I. O.), to which the contractors here belong, excludes from membership "foreman, superintendents and general managers."[17] The insistence of the C. I. O. steward that the contractor boners be required to join the union indicates that the workers in the plant do not even regard the con-

[15] In any event it has long been recognized that the employment relationship does not depend upon the right of the employer to dictate what particular hours are to be worked. Many persons held to be employees rather than independent contractors are given discretion as to when they will work. See *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C. C. A. 6); *Glielmi* v. *Netherland Dairy Co.*, 254 N. Y. 60, 171 N. E. 906, 907; *Burnet* v. *Livezey*, 48 F. 2d 159, 161 (C. C. A. 4); *Park Imp. Co.* v. *Review Board*, 36 N. E. 2d 985 (Ind. 1941); *Aisenberg* v. *C. F. Adams Co.*, 95 Conn. 419, 111 Atl. 591, 592; *Showers* v. *Lund*, 123 Neb. 56; *Martin* v. *Republic Steel Co.*, 226 Ala. 209; *Warner* v. *Fullerton-Powell Hardwood Lumber Co.*, 231 Mich. 328.

[16] The agreements themselves provided that all boners hired by the "contractor" should be required to join the C. I. O. Union (R. 34, 38). At the insistence of union officials, all "contractors" are also required to join (R. 104).

[17] See Florence Peterson, *Handbook of Labor Unions*, p. 264.

tractors as supervisory employees, much less as independent employers.

The authority to employ, supervise and direct other employees certainly does not of itself exclude the contractor from the status of employee. Many employees as a regular part of their duties interview, and hire employees and supervise and direct their work. Foremen frequently exercise these duties, without losing status as employees. Cf. *Packard Motor Car Co.* v. *National Labor Relations Board*, No. 658, this Term, decided March 10, 1947. That the contractors here acted on behalf of petitioners, rather than as independent employers, is particularly evident from the frequency and ease with which they shifted from "contractor" to employee and vice versa, and the accepted practice on the part of the contractor-boners to quit the job without notice to either petitioners or the other boners. Hooper, for example, had never been in business for himself and had worked at the Kaiser plant admittedly as an employee for almost a year before he signed a written contract as The Frank Hooper Boning Company (R. 16, 17, 35). None of the contractors had any independent business or had ever owned, leased or supplied premises for boning operations (R. 20). They worked as employees before they came to petitioners' plant (R. 16, 90), the first two representing that they

were "unemployed" when they came to Kaiser (R. 90); and some of them returned as employees after terminating contracts (R. 100–101).

Contractor-boners Peterson and Reed, within three months after signing contracts, terminated them without notice by simply failing to report for work (R. 16). Their reputed employees continued to work for petitioners, who selected one of them to succeed as "contractor." This contractor, Schindel, likewise abandoned his function simply by failing to report to work (R. 17). It is significant also that all of the boners whose status is at issue here were regularly hired for short periods each week to bone "City" cattle, as distinguished from Government-inspected cattle, as admitted employees of petitioners at an hourly rate (R. 107–108).

Many courts have indicated that one of the significant distinctions between an employee and an independent contractor is the liability the independent contractor incurs if he terminates the relation before the job is finished. *Industrial Comm.* v. *Hammond*, 77 Colo. 414, 236 Pac. 1006; *Decatur Ry. Co.* v. *Industrial Board*, 276 Ill. 472; *Coppes Bros. & Zook* v. *Pontius*, 76 Ind. App. 298; *Muncie Foundry, etc. Co.* v. *Thompson*, 70 Ind. App. 157; *Showers* v. *Lund*, 123 Neb. 56; *Martin* v. *Republic Steel Co.*, 226 Ala. 209; *Bodwell* v. *Webster*, 98 Neb. 664. The contracts provided for termination upon two

weeks' notice (R. 34–35); the relationship was, therefore, terminable at will.[18]

The method of compensation, also, rather than reflecting the independence of the contractors, reveals their dependence as employees. They are paid weekly on a poundage basis, so that their earnings are directly and solely dependent on the quantity of work performed for petitioners. This method of pay is nothing more than a piece-rate method characteristic of subservience, not independence. Cf. *United States* v. *Rosenwasser*, 323 U. S. 360; *Martin* v. *Republic Steel Co.*, 226 Ala. 209; *Swift & Co.* v. *Alston*, 48 Ga. App. 649; *Showers* v. *Lund*, 123 Neb. 56; *Bradley* v. *Republic Creosoting Co.*, 281 Mich. 177; *Burruss* v. *B. M. C. Logging Co.*, 38 N. M. 254, 258. Independent contractors normally risk capital and enjoy an opportunity for profit. Such is not the case here. The fact that the "contract" boner received and had the right to distribute the boning money is not inconsistent with employment, as has been frequently recognized in decisions under this Act (See *Walling* v. *Woodbine Coal Co.*, 64 F. Supp. 82 (E. D. Ky.); *Walling* v. *Atlantic Greyhound Corp.*, 61 F. Supp. 992 (E. D. S. C.); *Walling* v. *Southwestern Greyhound Lines*, 65 F. Supp. 52 (W. D. Mo.); *Walling* v. *American*

[18] The importance which has been attached to this factor is discussed at length in the Government's brief in *United States* v. *Silk* (pp. 50–51), this Term, No. 312.

Needlecrafts, Inc., 139 F. 2d 60 (C. C. A. 6), reversing 46 F. Supp. 16; but cf. *Walling* v. *Sanders*, 136 F. 2d 78 (C. C. A. 6)),[19] as well as in other decisions dealing with employment relationships. Cf. *Gulf Refining Co.* v. *Brown*, 93 F. 2d 870, 873 (C. C. A. 4); *Hillen* v. *Industrial Accident Comm.*, 199 Calif. 577, 250 Pac. 570; *Sempier* v. *Goemann*, 165 Wis. 103, 161 N. W. 354; *Decatur R. & Light Co.* v. *Industrial Board*, 276 Ill. 472, 114 N. E. 915; *Barg* v. *Bousfield*, 65 Minn. 355, 68 N. W. 45.

[19] In *Walling* v. *Woodbine Coal Co.*, 64 F. Supp. 82 (E. D. Ky.), the defendant coal company entered into written contracts with individuals as "independent contractors" for the mining of coal on its properties. The contract authorized such individuals to hire, discharge and supervise other miners. The company agreed to pay the "contractor" $2.10 per ton for all coal delivered to its tipples. The contractor, free from control or supervision by the company, distributed the money received among the men working with him in accordance with the arrangements between them. The court concluded that under *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, "not only the subordinate personnel but also the alleged independent contractors themselves are employees and within the protection of the provisions of the Fair Labor Standards Act" (p. 85). Similarly, in *Walling* v. *Atlantic Greyhound Corp.*, 61 F. Supp. 992 (E. D. S. C.); and *Walling* v. *Southwestern Greyhound Lines*, 65 F. Supp. 52 (W. D. Mo.), the defendant companies entered into contracts with purported "independent contractors" to secure workers for the performance of janitorial services and to supervise and direct them in their work. The "contractor" received a fixed monthly sum under the arrangement and divided it among the workers. The court held in both cases that the "contractor" and all the maintenance workers were "employed" by the bus companies within the meaning of the Act.

In short, it would appear that the slight degree of independence exercised by the contractors here is so far outweighed by their economic dependence upon and their close physical connection with petitioners' business as to make them employees even under common law concepts. Clearly they do not have such economic independence or control as to distinguish them from the workers for whose protection this Act was enacted. They are not entrepreneurs engaged in a boning business of their own. They are merely skilled workers, like the other boners and the other employees in petitioners' plant. Petitioners are dependent upon them to perform a necessary and regular step in the day-to-day operation of their business, and they in turn are dependent upon petitioners for their day-to-day livelihood. In these and other respects the contractors here resemble the newsboys held to be "employees" in *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111. And they are not distinguishable from the homeworkers and other so-called "independent contractors" whom the lower courts have consistently held to be employees within the scope of this Act.

Even before this Court's decision in the *Hearst* case, *supra*, the circuit courts of appeals in cases arising under this Act have usually looked to the "economic realities," rather than to technical common law concepts or to the contract terminol-

ogy, to determine whether an employment relationship existed between the parties to a contract. *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C. C. A. 6); *Fleming* v. *Palmer*, 123 F. 2d 749 (C. C. A. 1), certiorari denied, 316 U. S. 662; *Southern Railway Co.* v. *Black*, 127 F. 2d 280 (C. C. A. 4); cf. *Walling* v. *Plymouth Mfg. Co.*, 139 F. 2d 178 (C. C. A. 7).[20] And the decisions of the circuit courts of appeals subsequent to the *Hearst* decision have consistently recognized that the same liberal construction of employment relationships there applied to the National Labor Relations Act should be applied to the Fair Labor Standards Act. See, in addition to the decision below, 156 F. 2d 513 (C. C. A. 10), *Walling* v. *Twyeffort, Inc.*, 158 F. 2d 944 (C. C. A. 2), pending on petition for certiorari, No. 987; *Hargis* v. *Wabash Railroad Co.*, 6 W. H. Cases 580 (C. C. A. 7).

In the *American Needlecrafts* case, *supra*, despite a contract entered into by homeworkers with respect to each separate assignment calling "for a

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[20] As pointed out in the Government's response to the petition herein, the circuit courts of appeals showed greater reluctance to look behind contract forms where an intermediate person was designated as employer. *Bowman* v. *Pace Co.*, 119 F. 2d 858 (C. C. A. 5); *Walling* v. *Sanders*, 136 F. 2d 78 (C. C. A. 6); *Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616 (C. C. A. 8). The decision of the court below in the instant case is the first decision of a circuit court of appeals dealing with such a situation since the *Hearst* case.

completed job according to specification" (46 F. Supp. 16, 22), despite the fact that one worker sometimes distributed and collected the work and distributed the compensation for other workers, despite the absence of any supervision and inspection during the performance of the work and the freedom of the workers to determine their own hours of work, and despite the district court's ruling that the contract was a "valid contract voluntarily and bona fidely entered into" (*id.* at 23), the Sixth Circuit reversed the district court and held that the homeworkers were "employed" by the company, stating:

> It will avail us little to consider whether the master-servant relationship existed between the appellee and its homeworkers under the common law * * *. We are dealing * * * with a specific statute which, like the National Labor Relations Act, 29 U. S. C. A. § 151 et seq., is of a class of regulatory statutes designed to implement a public social, or economic policy through remedies not only unknown to the common law but often in derogation of it * * *. If the Act presently considered, expressly or by necessary implication, brings within the scope of its remedial and regulatory provisions, workers in the status here involved, we are not concerned with the question whether a master-servant relationship exists under otherwise applicable

rules of the common law [139 F. 2d 60, 63].[21]

Similarly in *Fleming* v. *Palmer, supra,* the terminology of the contract between the parties designating workers as members of a producers' cooperative, was disregarded by the First Circuit in favor of the "economic realities" of the arrangement, and the "cooperators" were held to be employees within the statutory definitions and purposes. The Second Circuit in *Walling* v. *Twyeffort, supra,* held outside tailors working for a clothing manufacturer to be employees within the meaning of the Act despite the fact that the tailors, like homeworkers, did not work on the manufacturer's premises, were under no immediate supervision in the performance of the work

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[21] Homeworkers have uniformly been held to be employees under the Act despite agreements designating them independent contractors. See *Fleming* v. *Palmer*, 123 F. 2d 749 (C. C. A. 1), certiorari denied, 316 U. S. 662; *Walling* v. *T. Buettner & Co.*, 5 Wage Hour Rept. 279 (N. D. Ill., 1942), reversed on other grounds, 133 F. 2d 306 (C. C. A. 7), certiorari denied, 319 U. S. 771; *Walling* v. *Muncie Novelty Co.*, 6 W. H. Cases 557 (S. D. Ind., 1946); *Walling* v. *Hastings*, 6 W. H. Cases 554 (S. D. Ind., 1946); *Walling* v. *Freidlin*, 66 F. Supp. 710 (M. D. Pa.), overruling *Walling* v. *Todd*, 52 F. Supp. 62 (M. D. Pa.); *Walling* v. *Schweitzer*, 6 W. H. Cases 283 (D. C. Puerto Rico, 1946); *Fleming* v. *Demeritt Co.*, 56 F. Supp. 376 (D. Vt.); *Walling* v. *Sieving*, 9 Wage Hour Rept. 356 (N. D. Ill., 1946); *Nelson* v. *Kupper Favor Co.*, 4 Wage Hour Rept. 699 (N. D. Ill., 1941); *Mason* v. *K. & P. Optical Mfg. Co.*, 42 F. Supp. 98 (S. D. N. Y.); *Walling* v. *Frank*, 62 F. Supp. 261 (W. D. Ky.); *Walling* v. *Wolff*, 63 F. Supp. 605 (E. D. N. Y.). See also *Walling* v. *Twyeffort, Inc.*, discussed above.

and were free to determine their own hours of work.

In *Southern Railway Co.* v. *Black*, 127 F. 2d 280, the Fourth Circuit held that red caps were employees of the railway company despite a written agreement designating them as "licensees" and despite the provision in the contract that they should look solely to tips from passengers for their compensation. In *Hargis* v. *Wabash Railroad Co., supra*, the Seventh Circuit held that a janitor employed at defendant's railroad terminal was an employee of the railroad regardless of the contract describing him as an "independent contractor." [22]

Petitioners' attempt to distinguish the above

[22] See also *Walling* v. *Sieving*, 9 Wage Hour Rept. 356 (N. D. Ill., 1946) (holding typists who addressed envelopes and labels in their homes for a company operating an addressing service to be "employees" notwithstanding a written contract designating them "independent contractors"); *Walling* v. *DeSoto Creamery & Produce Co.*, 51 F. Supp. 938 (D. Minn.) (holding buyer-drivers to be "employees" not independent contractors); *Walling* v. *Woodbine Coal Co.* 64 F. Supp. 82 (E. D. Ky.) (holding coal miners and the miners they engage to work with them to be "employees" notwithstanding written contracts which provided that the miners signing the agreement were independent contractors). To the same effect see *Walling* v. *Southwestern Greyhound Lines*, 65 F. Supp. 52 (W. D. Mo.) and *Walling* v. *Atlantic Greyhound Corp.*, 61 F. Supp. 992 (E. D. S. C.) (holding that workers, who agreed as "independent contractors" to secure other workers to clean and maintain bus stations and to supervise their work, to be employees notwithstanding the written agreements and the fact that under the arrangement the "contractor" received a fixed weekly sum which he divided among the workers).

cases on the ground that they involved "colorable, fraudulent and sham contracts" (pet. br., pp. 18–21) will not bear analysis. In the *American Needlecrafts* case, *supra,* as already indicated, there was a district court finding, comparable to the finding in the instant case, that the contract had been "bona fidely entered into" (46 F. Supp. at 23), and the opinion of the court of appeals was not predicated upon any different assumption. Likewise there was no hint in *Southern Railway Co.* v. *Black, supra,* that the contractual arrangements were sham contracts or entered into for the purpose of evading the Act. Nor was there any suggestion in the *Twyeffort* case that the contracts were regarded as fraudulent or for the purpose of circumventing the Act. These decisions, like numerous decisions on other aspects of the Fair Labor Standards Act, rest upon the premise that the statutory requirements are "mandatory on the courts regardless of the good faith of the employer." *Rigopoulos* v. *Kervan,* 140 F. 2d 506, 507 (C. C. A. 2). As this Court has stated, "The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce." *Brooklyn Savings Bank* v. *O'Neil,*

324 U. S. 697. See also *West Coast Hotel Co.* v. *Parrish*; 300 U. S. 379, and cases cited at pages 392–393.[23]

B. THE BONERS HIRED BY THE CONTRACTOR-BONERS

There can be no question that the boners hired by the contractor-boners are employees entitled to the protection of the Act. With respect to them, the only question is whether the responsibility rests upon petitioners, the proprietors of the business in which the boners are employed, or whether these employees must look exclusively to the contractor-boner, who himself is completely dependent upon the proprietors' business for his livelihood and who has no independent finances of resources.

If, as we contend, the contractor-boners are petitioners' employees, they are plainly acting "directly * * * in the interest" of their employer, petitioners, in hiring other boners (Section 3 (d)). It follows that the petitioners are

[23] Thus this Court has held (1) that an employee under the Act cannot contract to receive less than the amount due under the statute. *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697; *Schulte Co.* v. *Gangi*, 328 U. S. 108; (2) that "freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes." *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 42; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424; (3) that an agreement to accept nothing or an industrial practice or custom to the same effect is of no effect. *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, 602.

also employers of these other boners within the meaning of the Act. The purpose of the statutory definition of "employer" "seems obviously to render employers responsible * * * for acts of any persons performed in their interests." See *Packard Motor Car Co.* v. *National Labor Relations Board*, No. 658, this Term, decided March 10, 1947, slip sheet, p. 3.

The same reasons which require a construction holding petitioners responsible as employers of the contractor-boners, apply with equal, if not greater, force to the other boners. Not only are the words of the statutory definitions comprehensive enough to warrant this construction, but it is obvious that the objectives of the Act will be stifled if factory and plant operators are free to delegate the responsibility to comply with the minimum standards, and employees "are to have recourse as an employer only to one of their own, without financial responsibility or control of any capital." See *Lehigh Valley Coal Co.* v. *Yensavage*, 218 Fed. 547, at 552.

As pointed out, *supra*, pp. 27–29, the language of the statutory definitions appears to have been chosen deliberately to protect the basic labor standards from breaking down through such shifting of responsibility. Congress, it seems not without careful consideration, regarded the need to eliminate oppressive substandard labor conditions on a par with the need to eliminate oppressive child labor. Thus it is unnecessary to "draw

on some unexpressed spirit outside the bounds of the normal meaning of words" (cf. *Addison* v. *Holly Hill, supra,* p. 617) or outside the policy of the statute, to hold a plant proprietor or operator to stricter accountability in these matters than might be warranted where less fundamental policies are at stake.

Petitioners' chief argument is that they have no contractual relation with these boners and in particular no express or implied contractual obligation to pay their compensation. This argument fails completely, of course, if the contractor-boners act "directly or indirectly in the interest" of petitioners in hiring the boners, as we think the record clearly establishes they do. But, in any event, the contractual relations and obligations are not entitled to the controlling significance petitioners would attach to them. It would be wholly illogical to hold that contractual arrangements cannot deprive a worker of the minimum wage and overtime standards of the Act (see cases cited, *supra,* p. 44, n. 23), but that he can waive his status as an employee under the Act by the simple expedient of signing a contract. The fact that petitioners assumed no contractual obligation to pay the boners does not mean they have no statutory obligation for the labor standards of such workers. Petitioners unquestionably employ these boners in the sense that they "suffer or permit" them "to work" in petitioners' business, to petitioners' im-

mediate advantage, and with full expectation of compensation for their services.

Nothing in this Court's opinion in *Walling* v. *Portland Terminal Co., supra,* on which petitioners rely, supports the contention that an employment relationship cannot exist within the meaning of the Act in the absence of a contractual obligation on the part of the alleged employer to pay compensation directly to the alleged employee. Petitioners' reliance on a few phrases from the *Portland* opinion seems to overlook the admonition that "words of [this Court's] opinions are to be read in the light of the facts of the case under discussion" and that "general expressions transposed to other facts are often misleading." *Armour & Co.* v. *Wantock,* 323 U. S. 126, at 132–133. The *Portland* case was concerned with trainees whose work was of no immediate advantage to the business and indeed actually impeded and retarded it, and who never expected to receive compensation from anyone for their work. That case did not involve the question here presented, whether a person who authorizes the employment of workers to perform services regularly in his business to the immediate advantage of his business and who agrees to pay for such services can avoid responsibility as an employer under the Act by interposing an agent to hire the workers and to distribute the compensation for the services.

It has long been recognized, even under common law concepts, that an employment relation-

ship can exist even though there is no contractual obligation on the part of the employer to pay the employee anything and the employee must look to some third party for compensation. *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386; *Southern Railway Co.* v. *Black*, 127 F. 2d 280 (C. C. A. 4); *Jones* v. *Goodson*, 121 F. 2d 176 (C. C. A. 10); see other cases cited, *supra*, pp. 37–38. As the Circuit Court of Appeals for the Fourth Circuit said in response to a similar argument made in *Southern Railway Co.* v. *Black*, *supra*: "The determinative factor is not the source of their compensation * * *. We are not impressed with the argument that the companies can escape the payment of minimum wages to them [red caps] simply by providing that they shall look for compensation to tips from persons whom they assist." 127 F. 2d 281–282.

It would miss the whole purpose of legislation such as this, as Judge Learned Hand has pointed out in a comparable situation, if employees

> are to have recourse as an employer only to one of their own, without financial responsibility or control of any capital * * *. This misses the whole purpose of such statutes, which are meant to protect those who are at an economic disadvantage. * * *. It is absurd to class such a [worker] as an independent contractor in the only sense in which that phrase is here relevant. He has no capital; no financial responsibility. He is himself as dependent upon the con-

ditions of his employment as the company fixes them as are his helpers [*Lehigh Valley Coal Co.* v. *Yensavage*, 218 Fed. at 552–553].

The record in this case convincingly illustrates the absurdity of permitting such delegation. Petitioners have known well that most of the "contractors" they select are responsible neither as contractors nor as employers. When the first contract was signed by Reed and Peterson, petitioners were advised that one of the "contractors" could not be trusted with the money—he had to be watched "on his drinking" and "to see that the men were paid" (R. 92). When a contractor quit without notice to petitioners or to his "employees," petitioners made no pretense of asserting any claim for unlawful termination of the contract "because we knew the way the men worked, that they made themselves 100 to 130 and 140 dollars a week, and they would always be broke the following Monday morning, so you couldn't come back on people like that" (R. 94). Nevertheless petitioners see no reason why workers in their plant—workers unquestionably entitled to the protection of the Act—should not be obliged to "come back on people like that" to secure the statutory minimum labor standards.

It is no answer to say that the boners voluntarily chose these irresponsible contractors as their employers and had a promise and expectation of compensation only from them. The fact is that the actual selection was petitioners'—peti-

tioners voluntarily chose these men to act as their agents in securing other boners. The literal terms of the statute, we think designedly, are broad enough to afford some degree of protection against such irresponsible delegation. Under the terms and purposes of the statute, whether or not the contractor-boners may be responsible as an employer to the other boners, petitioners would not be relieved of responsibility. The Act seems to have contemplated that under some circumstances several persons might be held to be employers responsible for assuring compliance with the statutory minimum labor standards. The definition of "employer" (Section 3 (d)), including "any person acting directly or indirectly in the interest of an employer" is broad enough and seems designed to insure enforcement of the minimum standards without the necessity of identifying the particular employer who in a strict legal sense might have the ultimate financial responsibility. We contend that, in so far as practicable, the literal language should be construed so as to afford this protection and thereby to accomplish the basic purposes of the Act.

II

THE "FINDINGS OF FACT" BY THE DISTRICT COURT DO NOT FORECLOSE THE ULTIMATE LEGAL ISSUE WHETHER THE BONERS ARE PETITIONERS' EMPLOYEES

The concurring opinion of Judge Phillips expresses the view that under Rule 52 of the Rules

of Civil Procedure the Circuit Court of Appeals was bound by the district court's findings of fact and, therefore, was not free to conclude that the boners are employees of petitioners (R. 173–175). In support of this view his opinion states: "The credibility of witnesses, the weight to be given to their evidence, and the inferences which may be reasonably drawn from the evidence are matters within the province of the trial court" (R. 174). But the opinion of the Circuit Court of Appeals does not indicate that it disregarded the trial court's findings of fact. As we read the majority opinion, the circuit court of appeals merely exercised its undeniable right to review the trial court's judgment as to the legal conclusions to be drawn from the facts found.*

It is fundamental that "the conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based." *Baumgartner* v. *United States*, 322 U. S. 665, 670–671. The evidence in the present case consists entirely of a stipulation (R. 10–31), depositions (R. 46–53,

* *Murray* v. *Noblesville Mining Co.*, 131 F. 2d 470, 474 (C. C. A. 7), certiorari denied, 318 U. S. 775; *Duquesne Club* v. *Bell*, 123 F. 2d 303, 364–365 (C. C. A. 3), certiorari denied, 317 U. S. 638; *Local No. 6167* v. *Jewell Ridge Coal Corp.*, 145 F. 2d 10, 12 (C. C. A. 4), affirmed, 325 U. S. 161; *United States* v. *Armature Rewinding Co.*, 124 F. 2d 589, 591 (C. C. A. 8); *United States* v. *Anderson*, 108 F. 2d 475, 478–479 (C. C. A. 7); *Kuhn* v. *Princess Lida of Thurn & Taxis*, 119 F. 2d 704, 705–706 (C. C. A. 3).

53–63, 65–143), and miscellaneous documents (R. 32, 35, 40, 41, 44, 45). There was no oral testimony taken before the trial court. Where the evidence is of such a character as here, the appellate court is in as good a position as the trial court to appraise the evidence and draw the ultimate conclusions of law, without being bound conclusively by the latter's "findings of fact". *Equitable Life Assur. Soc.* v. *Irelan*, 123 F. 2d 462, 464 (C. C. A. 9); *Pfeifer Oil Transp. Co.* v. *The Ira S. Bushey*, 129 F. 2d 606, 607 (C. C. A. 2); *Stokes* v. *United States*, 114 F. 2d 83, 85 (C. C. A. 2); *Smith* v. *Royal Ins. Co.*, 125 F. 2d 222, 224 (C. C. A. 9). The courts have often ruled that inferences or conclusions drawn by the trial court from stipulated facts, testimony which has not been personally heard, or undisputed evidence, do not preclude the reviewing court from drawing other inferences also permissible from such evidence. *Sun Insurance Office, Ltd.* v. *Be-Mac Transportation Co.*, 132 F. 2d 535, 536 (C. C. A. 8); *United States* v. *Mitchell*, 104 F. 2d 343, 346 (C. C. A. 8); *Carter Oil Co.* v. *McQuigg*, 112 F. 2d 275, 279, (C. C. A. 7). And see *Banister* v. *Solomon*, 126 F. 2d 740, 741 (C. C. A. 2); *Himmel Bros. Co.* v. *Serrick Corp.*, 122 F. 2d 740, 742 (C. C. A. 7);

Stewart v. *Ganey*, 116 F. 2d 1010, 1013 (C. C. A. 5).[25] This was the rule in equity before the adoption of the Federal Rules of Civil Procedure, and it was not the purpose of Rule 52 to change the prior equity practice. *Equitable Life Assur. Soc.* v. *Irelan*, 123 F. 2d 462, 464 (C. C. A. 9); *State Farm Mut. Auto. Ins. Co.* v. *Bonacci*, 111 F. 2d 412, 414–415 (C. C. A. 8); *Kuhn* v. *Princess Lida of Thurn & Taxis*, 119 F. 2d 704 (C. C. A. 3).

In any event, since the evidentiary facts are undisputed, the "findings of fact" of the district court on the ultimate legal issue—whether the boners were petitioners' employees—were subject to review by the circuit court of appeals if such "findings" were based upon a mistaken conception of the employment relationship under the Act. As we have indicated in Point I, the district court based its "findings" upon the erroneous theory that the contractual arrangements and common-law concepts were controlling in determining the scope of employment under the Act. "Findings of fact" resting upon an erroneous construction of the applicable statute are not regarded as conclusive in reviewing administrative determinations; and we know of no authority which requires that "findings" of a trial court be treated as conclusive when they are subject to the same legal infirmity.

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[25] For a more elaborate treatment of this subject, see Stern, *Review of Findings of Administrators, Judges & Juries: A Comparative Analysis*, 58 Harvard Law Review 70, 112–122.

III

EVEN THOUGH THE BONERS WERE NOT PETITIONERS' EMPLOYEES, THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED ON THE GROUND THAT PETITIONERS SHIPPED GOODS IN VIOLATION OF SECTION 15 (A) (1)

Section 15 (a) (1) makes it unlawful for any person

> (1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employees was employed in violation of section 6 or section 7 * * *.

It is not denied that all of the boners worked in excess of 40 hours a week and have not been paid overtime in accordance with Section 7 (R. 161). Petitioners know that the prescribed labor standards are not being met in their employment. Petitioners also know that the boned beef is produced for interstate shipment. Consequently, the shipment of such goods by petitioners in interstate commerce is plainly within the prohibition of Section 15 (a) (1). See *United States* v. *Darby*, 312 U. S. 100, 121, 122; *Southern Advance Bag & Paper Co.* v. *United States*, 133 F. 2d 449 (C. C. A. 5); *Enterprise Box Co.* v. *Fleming*, 125

F. 2d 897 (C. C. A. 5); *Walling* v. *Belikoff Bros.*, 147 F. 2d 1008 (C. C. A. 2); *Walling* v. *Mid-Continent Pipe Line Co.*, 143 F. 2d 308 (C. C. A. 10); *Walling* v. *Acosta*, 140 F. 2d 892 (C. C. A. 1).

Therefore, even though the boners were not petitioners' employees, the failure to pay the boners "hired" by the contractors—who, under any view, were certainly "employees" entitled to protection under the Act—resulted in violations of Section 15 (a) (1) which would warrant the issuance of the injunction as ordered by the court below.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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APRIL 1947.

APPENDIX

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201.

SEC. 3. As used in this Act—

* * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * *

SEC. 11.

* * * * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

USE OF WORDS "EMPLOYED, PERMITTED, OR SUFFERED TO WORK" IN CHILD LABOR LEGISLATION AT TIME OF ENACTMENT OF FAIR LABOR STANDARDS ACT

Alabama (Code 1940, title 26, ch. 7, Art. 3, sec. 343).

Arizona (Code 1939, sec. 56–301).

California (Labor Code, Div. II, Pt. 4, sec. 1290).

Colorado (1935 Stats. ch. 97, sec. 182).

Delaware (Rev. Code 1935, #3601, sec. 11).

District of Columbia (D. C. Code 1940, sec. 36–201).

Florida (Laws 1913, ch. 6488, sec. 3).

Georgia (Code 1933, ti. 54, sec. 54–303).

Idaho (Code 1932, Vol. 3, ch. 8, sec. 43–801, 43–804).

Illinois (Rev. Stats. 1945, ch. 48, sec. 17).

Kansas (General Statutes, ch. 38–601).

Louisiana (General Statutes, ti. 34, ch. 5, sec. 4319).

Maine (Rev. Stat. 1944, ch. 25, secs. 17–18).
Maryland (Code 1939, Art. 100, sec. 4).
Michigan (Compiled Laws of 1929, sec. 8325).
Minnesota (Masons Stats. 1927, sec. 4094, 4100, 4106).
Missouri (Rev. Stats. 1939, sec. 9619).
Nebraska (Rev. Stats. 1943, ch. 48, secs. 301–302, 310).
New Hampshire (Public Laws 1926, ch. 118, sec. 18).
New Jersey (Rev. Stats. 1937, Ti. 34, sec. 2–5).
New Mexico (Comp. Stat. 1929, sec. 80–101).
North Carolina (P. L. 1937, ch. 317, sec. 1).
North Dakota (1923, ch. 155, sec. 1).
Ohio (Genl. Code, 1940, sec. 12993).
Oregon (Comp. Laws 1940, sec. 102–401).
Rhode Island (Pub. Laws 1936, ch. 2360, sec. 3).
Tennessee (Code 1932, sec. 5314).
Utah (1933, ch. 11, sec. 1).
Vermont (Pub. Laws 1933, sec. 6583).
Virginia (Code 1942, sec. 1808a).
West Virginia (Code, 1931, ch. 21, Art. 6, secs. 1–2).
Wyoming (Rev. Stat. 1931, sec. 20–301).

USE OF WORDS "EMPLOYED OR PERMITTED TO WORK" IN CHILD LABOR LEGISLATION AT TIME OF ENACTMENT OF FAIR LABOR STANDARDS ACT

Arkansas (Pope's Digest, 1937, vol. II, sec. 9067) (Acts 1915, p. 1505).
Connecticut (Genl. Stats. cum. supp. 1935, ch. 279, sec. 1604c; supp. 1939, ch. 279, sec. 1320e).
Georgia (Code 1933, Title 54, sec. 54–301).
Idaho (Code 1932, vol. 3, ch. 8, sec. 43–802).
Indiana (Burns' Stats. 1933, sec. 28–518).

Kentucky (R. S. 1946), ch. 339, sec. 339.010).
Massachusetts (Genl. Laws, 1932, ch. 149, sec. 60).
Minnesota (Mason's Stats. 1927, sec. 4103).
Mississippi (Code 1930, sec. 4645).
Montana (R. C. 1935, sec. 3095).
New Hampshire (P. L. 1926, ch. 118, sec. 22; ch. 176, sec. 14, 16).
New Jersey (R. S. 1937, ti. 34, sec. 2–2).
Oklahoma (Stats. 1931, sec. 10833).
Oregon (Comp. Laws 1940, sec. 102–405).
Pennsylvania (Purdon's Stats. 1936, Ti. 43, sec. 42).
West Virginia (Code 1931, c. 21, Art. 6, secs. 3, 7).
Wisconsin (Stats. 1945, sec. 103.23).

FEDERAL CHILD LABOR STATUTES USING WORDS "EMPLOYED OR PERMITTED TO WORK"

Act of September 1, 1916, c. 432, 39 Stat. 675.
Act of February 24, 1919, c. 18, 40 Stat. 1057, 1138.

U. S. GOVERNMENT PRINTING OFFICE: 1947

SUPREME COURT OF THE UNITED STATES

No. 562.—October Term, 1946.

Rutherford Food Corporation and the George Kaiser Packing Company, Petitioners, v. William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[June 16, 1947.]

Mr. Justice Reed delivered the opinion of the Court.

The Administrator of the Wage and Hour Division of the Department of Labor brought this action to enjoin the Rutherford Food Corporation and the Kaiser Packing Company from further violating the Fair Labor Standards Act.[1] The Administrator alleged that the defendants had repeatedly failed to keep proper records and to pay certain of its employees overtime as required by § 7 of the Act.[2] The District Court refused to grant the injunction. The Circuit Court of Appeals reversed on appeal, and directed the entry of the judgment substantially as prayed for. *Walling* v. *Rutherford Food Corporation*, 156 F. 2d 513. We brought the case here because of the importance of the issues presented by the petition for certiorari to the administration of the Act.

The Fair Labor Standards Act of 1938, enacted June 25, 1938, is a part of the social legislation of the 1930's of the same general character as the National Labor Relations Act of July 5, 1935, 49 Stat. 449, and the Social Security Act of August 14, 1935, 49 Stat. 620. Decisions that define the coverage of the employer-employee relationship

[1] 52 Stat. 1060.

[2] 29 U. S. C. § 207.

under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act. See *Board* v. *Hearst Publications*, 322 U. S. 111; *United States* v. *Silk*, Nos. 312 and 673, decided today.

The petitioners are corporations of Missouri authorized to do business in Kansas. The slaughterhouse of the Kaiser Packing Company, the place of the alleged violations with which we are concerned, and the principal place of business of that company, is in Kansas City, Kansas, from which it ships meat in interstate commerce. Since 1942 most of its product has been boned beef. The petitioner, Rutherford Food Corporation, has its principal place of business and its plant for processing meat products in Kansas City, Missouri. In 1943, Rutherford bought 51% of the stock of Kaiser in order to assure itself of a constant supply of boned beef for contracts it had with the U. S. Army. Kaiser had been operating and continued to operate at a loss, and Rutherford advanced more than $50,000 to Kaiser between March, when Rutherford bought the Kaiser stock, and July, 1943. To assure itself of a continued supply of meat, Rutherford leased Kaiser's facilities and took over operation of the slaughterhouse in July. In May, 1944, the lease was terminated and Rutherford's stock interest in Kaiser sold, so that Kaiser might qualify for subsidies granted by the Defense Supplies Corporation to unaffiliated nonprocessing slaughterers under its Regulation No. 3.[3]

Prior to 1942 Kaiser had one hourly paid employee who acted as a combined butcher, beef boner and order filler. During 1942, in order to be able to furnish beef boned to Army specifications to the Army under contract, Kaiser entered into a written contract with one Reed, an experienced boner, which provided that Reed should assemble

[3] 8 F. R. 10826; 8 F. R. 14641; 9 F. R. 1820.

a group of skilled boners to do the boning at the slaughter-house. The terms of the contract were that Reed should be paid for the work of boning an amount per hundred-weight of boned beef, that he would have complete control over the other boners, who would be his employees, that Kaiser would furnish a room in its plant for the work known as the boning vestibule, into which the carcasses of cattle slaughtered by Kaiser would be moved on overhead rails by Kaiser employees, that Kaiser would also furnish barrels for the boned meat which would be washed and moved out of the vestibule by Kaiser's employees. Reed abandoned the work in February, 1943, and the work was taken over under an oral contract by one of the boners who had worked with him. This boner, Schindel, also abandoned the work in May, 1944, and an oral contract was then made by the company with Hooper and Deere, who had worked with Schindel. After a few months Deere left, at which time Hooper entered into a written contract substantially like the one between Kaiser and Reed, save that it provided for rent to be paid by Hooper for the boning room, although as a matter of fact no rent was ever paid. The District Court found that since the boning work had started in 1942, the money paid by Kaiser had been shared equally among all the boners, except for a short time after Hooper took over the work when he paid some of the boners by the hour. It was stipulated further that the boners owned their own tools, although these consisted merely of a hook to hold the meat, a knife to cut it, a sharpener for the knife, and a leather belt (apron). Although the C. I. O. union which was the representative of the workers of the company insisted that the boners be members, and although the written contracts provided that they should join, it was stipulated that the union dues of the boners were not checked off and that the boners were not subject to the authority of the union steward at the plant.

The slaughterhouse operations, of which the boning is a part, are carried on in a series of interdependent steps. The cattle are slaughtered, skinned and dressed in the killing room, and the carcasses are moved thence on overhead rails into an overnight cooler by employees of Kaiser. The next day they are moved into another cooler and then into the boning vestibule, on the same overhead rail. They move around the boning room on the rail, each boner cutting off a section for boning. The boneless meat is put into barrels, or passed to a trimmer, an employee of Kaiser, who trims waste matter from the boned meat. Waste is put into other barrels. The barrels are moved from the boning room by employees of Kaiser into another room, called the dock, where the meat is weighed and put on trucks. Kaiser has never attempted to control the hours of the boners, but they must "keep the work current and the hours they work depend in large measure upon the number of cattle slaughtered." 156 F. 2d 513, 515. It is undisputed that the president and manager of Kaiser goes through the boning vestibule many times a day and "is after the boners frequently about their failure to cut all of the meat off the bones."

The Administrator thought these facts brought the boners within the classification of employees, as that term is used in the Act. But the District Court thought that they were independent contractors, and denied the injunction sought by the Administrator. The Circuit Court of Appeals, however, said: "The operations at the slaughterhouse constitute an integrated economic unit devoted primarily to the production of boneless beef. Practically all of the work entering into the unit is done at one place and under one roof. . . . The boners' work alongside admitted employees of the plant operator at their tasks. The task of each is performed in its natural order as a contribution to the accomplishment of a common objective." In its view the test for determining who was an employee under the Act was not the common law test of

control, "as the Act concerns itself with the correction of economic evils through remedies which were unknown at common law . . ." It concluded that the "underlying economic realities . . . lead to the conclusion that the boners were and are employees of Kaiser . . ." 156 F. 2d 513, 516–17.

The Fair Labor Standards Act was passed by Congress to lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions. An effort to eliminate low wages and long hours was the method chosen to free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers. It was sought to accomplish this purpose by the minimum pay and maximum hour provisions and the requirement that records of employees' services be kept by the employer.[4] To make the method effective, the Act contains a section granting to the district courts of the United States jurisdiction to enjoin certain violations of the Act here involved, relating to the keeping of records of employment and the paying of overtime.[5] Whether or not the acts charged in this complaint violate the Act depends, so far as the meat boners are concerned, upon a determination as to whether either or both respondents are employers of the boners. As our conclusion requires further action in the trial court to frame the injunction, we shall treat only the question of the relationship of the boners to the alleged employers. We shall not in our consideration undertake to reach any conclusion as to the appropriate form of an injunction. We pass only upon the question whether the boners were employees of the operator of the Kansas plant under the Fair Labor Standards Act.

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[4] 52 Stat. 1060, §§ 2, 6, 7, 11 (c). *United States* v. *Darby*, 312 U. S. 100, 125; *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577–78.

[5] 52 Stat. 1060, §§ 17, 15, 7 (a), 11 (c).

As in the National Labor Relations Act and the Social Security Act, there is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act. Provisions which have some bearing appear in the margin.[6] The definition of "employ" is broad. It evidently derives from the child labor statutes and it should be noted that this definition applies to the child labor provisions of this Act, § 12.[7] We have decided that it is not so broad as to include those "who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." *Walling* v. *Portland Terminal Co.*, No. 336, this term, decided February

[6] 52 Stat. 1060, § 3:
"As used in this Act—

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . .
"(e) 'Employee' includes any individual employed by an employer.

"(g) 'Employ' includes to suffer or permit to work."

[7] Note 11 in the brief for the United States summarizes the relevant data:

"At the time of the enactment of the Fair Labor Standards Act, the phrase 'employed, permitted or suffered to work' was contained in the child labor statutes of thirty-two States and the District of Columbia. The same phraseology appeared in the Uniform Child Labor Laws recommended in 1911 and in 1930 by the National Conference of Commissioners on Uniform State Laws (Child Labor Bulletin, Vol. I, No. 2, August 1912; Proceedings of the National Conference, 1930), in the Standard Child Labor Law recommended in the Child Labor Legislation Handbook compiled by Josephine C. Goldmark (See *e. g.*, issue of 1904, p. 11), and in the Standards Recommended for Child Labor Legislation by the International Association of Governmental Labor Officials. The phrase 'employed or permitted to work' was found in seventeen State statutes as well as in the Federal statutes held unconstitutional in *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Child Labor Tax Case*, 259 U. S. 20. The statutes are cited in the Appendix to this brief, *infra*, pp. 59–60."

17, 1947. In the same opinion, however, we pointed out that "This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." Slip op., p. 3. We have said that the Act included those who are compensated on a piece rate basis. *United States* v. *Rosenwasser*, 323 U. S. 360. We have accepted a stipulation that station "red-caps" were railroad employees. *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386, 391. There may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees. See *United States* v. *Silk*, *supra*; compare *Roland Electrical Co.* v. *Walling*, 326 U. S. 657; *Martino* v. *Michigan Window Cleaning Co.*, 327 U. S. 173. We conclude, however, that these meat boners are not independent contractors. We agree with the Circuit Court of Appeals, quoted above, in its characterization of their work as a part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment. Where the work done, in its essence, follows the usual path of an employee, putting on an "independent contractor" label does not take the worker from the protection of the Act.[8]

The District Court was of the view that:

> "The right to contract is not only an inherent right but a constitutional right, and independent contracts, as a method of quantity production of boned beef, have not been uncommon in the packing business, generally. . . . The plan under which boners share equally in the boning money is commonly employed in Kansas City and elsewhere, and

[8] See *Walling* v. *American Needlecrafts*, 139 F. 2d 60; *United States* v. *Vogue, Inc.*, 145 F. 2d 609; *Walling* v. *Twyeffort, Inc.*, 158 F. 2d 944.

most of the boners who have worked in the Kaiser plant have worked at various times and in various plants under independent contractors. There is nothing inequitable in the sharing method under which compensation is divided equally among the group. It gives each man an interest in the amount of work being done by the other members of the group. It also gives no advantage to the man who is boning the fleshier parts of the carcass. Under this plan beginners and casual boners can be equitably taken care of by payment on an hourly basis out of the boning money."

We think, however, that the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity. Viewed in this way, the workers did a specialty job on the production line. The responsibility under the boning contracts without material changes passed from one boner to another. The premises and equipment of Kaiser were used for the work. The group had no business organization that could or did shift as a unit from one slaughterhouse to another. The managing official of the plant kept close touch on the operation. While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor. Upon the whole, we must conclude that these meat boners were employees of the slaughtering plant under the Fair Labor Standards Act.

We therefore affirm the conclusion to that effect of the Circuit Court of Appeals and modify the direction of the judgment of that court "for entry of a judgment substantially as prayed," so as to leave the District Court free to frame its decree in accordance with this decision.

It is so ordered.